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Office - Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,

Petitioner,

vs.

HEATING EQUIPMENT MANUFACTURING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, EIGHTH DISTRICT

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HEATING EQUIPMENT MANUFACTURING CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to the Court of Appeals of Ohio, Eighth District, Cuyahoga County, Ohio, to review the judgment entered November 7, 1951, in cause No. 22206 on its docket, entitled "Heating Equipment Manufacturing Co., Plaintiff-Appellee, vs. Ben Friedman, Defendant-Appellant," wherein the Court affirmed the judgment of the Court of Common Pleas of Cuyahoga County. Said judgment of the Court of Appeals was a final judgment rendered by the highest court of the State of Ohio on which a decision could be had by virtue of

the fact that on February 6, 1952, the Supreme Court of Ohio overruled the Motion to Certify the Record.

A transcript of the record of the case is furnished herewith, in accordance with the rules of this Court.

Opinions Below

The finding of the Court of Common Pleas is set forth at length in the Record (R. 20-21). The judgment of the Court of Common Pleas was affirmed without written opinion by the Court of Appeals, Eighth District, on November 7, 1951 (R. 174). The Motion to Certify the Record was overruled by the Supreme Court of Ohio on February 6, 1952, with no written opinion (R. 176).

Jurisdiction

1. The judgment of the Court of Appeals was entered on November 7, 1951 (R. 174). This was a judgment rendered by the highest court of the State of Ohio in which a decision could be had because the Supreme Court of Ohio, on February 6, 1952, overruled the Motion to Certify the Record (R. 176).

2. Upon consideration of the Application of counsel for Petitioner, on April 29, 1952, it was ordered by this Court that the time for filing Petition for Writ of Certiorari be extended to and including July 5, 1952 (R. 177).

3. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

4. The section of the Constitution of the United States that is involved is Amendment XIV, Section 1, which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. The federal questions sought to be reviewed arise from the denial to the Petitioner of due process of law and the equal protection of the laws as guaranteed in the XIV Amendment of the Constitution of the United States, Section 1. Petitioner contends that he was denied these fundamental rights by reason of (1) the failure of the courts of Ohio to give effect to a contract (R. 164) which was clear and unequivocal on its face, (2) in permitting a judgment to be taken against Petitioner based upon the theory of damages although essential facts to compute damages were neither alleged (R. 1-4) nor proved, (3) in giving judgment based on rescission where a rescission of the original contract of sale was neither alleged (R. 1-4) nor proved, and (4) where the previous course of dealings between the parties and subsequent acts and conduct of Respondent would bar them from claiming a rescission of the contract.

The effect of the error of the Court below was to deny fundamental rights to Petitioner which are guaranteed by the United States Constitution, because the case was arbitrarily and capriciously decided in violation of settled principles of law and contrary to fact.

Questions Presented

The question presented is whether due process of law and the equal protection of the laws as guaranteed by the XIV Amendment, Section 1, of the Constitution of the United States is denied where the courts of a State in violation of settled principles of law and contrary to undisputed facts:

(1) Fail to give effect to a contract which was clear and unequivocal on its face.

(2) Permit a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.

(3) Permit judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.

(4) Permit judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.

Section of the Constitution Involved

The pertinent Section of the Constitution of the United States is the XIV Amendment, Section 1, which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner is engaged in the business of selling steel, with his principal office in Cleveland, Ohio. Respondent is a manufacturer using steel in San Francisco, California. Respondent purchased an order of steel from Petitioner and paid for it on sight draft bill of lading. Respondent subsequently claimed that the shipment did not conform to the terms of the original agreement, and asked for a refund of Thirteen Thousand Six Hundred Twenty-four Dollars and Forty-one Cents ($13,624.41), which was computed upon the value of the merchandise allegedly not conforming to the agreement, plus additional costs and expenses charged by Respondent. Respondent accepted and used a portion of the merchandise. A portion of the steel ordered by Respondent was of a gauge that could not be used in its business operations. The order provided that this steel was not to exceed a certain percentage of the shipment. Respondent claimed that it exceeded the agreed percentage and objected to its quality. In previous orders from Petitioner, and from

other sellers of steel (R. 91-92). Respondent had ordered steel of the unusable gauge and quality (R. 95) and had placed it in a warehouse (R. 92-93). This prevailed at the time due to the shortage of steel, among other reasons. After extensive negotiations over a period of seven months, Respondent and agent of Petitioner met in Respondent's office in San Francisco, California, where the agent for Petitioner accepted and signed a letter (R. 164) containing an offer by Respondent to accept the difference between nine and one-half cents per pound and the amount previously demanded of Petitioner by Respondent. The mathematical computation of this difference is Three Thousand Four Hundred Thirty-nine Dollars and Thirty-six Cents ($3,439.36). Despite this contract, Respondent filed suit in the Court of Common Pleas of Cuyahoga County for the full amount previously demanded by it. The petition of Respondent alleged an account between the parties for the disputed steel. It did not allege a rescission of the contract, nor the value of the steel which was delivered. The petition contained an Exhibit (R. 3-4) which set forth the cost price of the steel that was in dispute plus other charges incurred by Respondent thereby. Petitioner filed an Answer of general denial. Respondent secured a judgment against petitioner in the amount of Nine Thousand Three Hundred Twenty-one Dollars and Eighty-four Cents ($9,321.84). Thereafter Petitioner appealed to the Court of Appeals for the Eighth District of Ohio, Cuyahoga County, Ohio, which Court affirmed the judgment of the trial court. Petitioner then filed a Motion to Certify the Record in the Supreme Court of Ohio, and on February 6, 1952, that Court overruled the Motion to Certify the Record.

Specification of Errors

1. The Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Cuyahoga County, and the

Supreme Court of Ohio erred in overruling the Motion to Certify the Record, in the following respects:

a. In failing to give effect to a contract which was clear and unequivocal on its face.

b. In permitting a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.

c. In permitting judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.

d. In permitting judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.

2. The errors of the Court of Appeals, and the Supreme Court of Ohio, caused a denial to Petitioner of due process of law and the equal protection of the laws as guaranteed by the XIV Amendment of the Constitution of the United States, Section 1.

Reasons for Granting the Writ

1. *When a case is decided by a State court in violation of settled principles of law, and contrary to undisputed facts, due process of law and the equal protection of the laws are not afforded to the parties.*

In *Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383, it was said that due process of law implies at least a conformity with the natural and inherent principles of justice, and that: the privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

This Court has stated that the requirements of constitutional due process impose upon the Supreme Court responsibilities to see that it is not denied. In *Rochin* v. *California*, 96 L. Ed. 154 (advance sheets for January 14, 1952), Mr. Justice Frankfurter stated:

> "However, this Court, too, has its responsibility. Regard for the requirements of the due process clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even towards those charged with the most heinous offenses.' Malinski vs. New York, Supra, at 416-417.
>
> These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder vs. Massachusetts, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko vs. Connecticut, 302 U. S. 319, 325."

Further, in *Haley* v. *Ohio*, 332 U. S. 596, 68 S. Ct., 302, Mr. Justice Frankfurter said:

> "The doubts and difficulties arise from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to the 'vague contours' of due process, or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review."

Petitioner was denied due process and the equal protection of the laws.

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment.

> Judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

It has been held that if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, the judgment is a violation of the Fourteenth Amendment of the Federal Constitution. *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 38 S. Ct. 566.

While a judicial decision may not be "law" within the meaning of Article I, Section 10, of the Federal Constitution, it is true nevertheless, that when the decision of the highest Court of a state amounts to a willful, capricious, discriminatory, and arbitrary disregard of the contractual rights of the individual due process of law is not afforded. *Roberts v. N. Y.*, 295 U. S. 264, 55 S. Ct. 689; *Chicago Life Insurance v. Cherry*, 244 U. S. 25, S. Ct. 492; *Brinkerhoff Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 50 S. Ct. 450.

In the instant case the judgment was based upon damages which were neither alleged (R. 14) nor proved, and upon a claim of return of merchandise although rescission was neither alleged (R. 14) nor proved. This is contrary to the holdings that a court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings, *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 281, 34 S. Ct. 496; *Barnes v. Chicago M. & St. P. R. Co.*, 122 U. S. 1, 14, 7 St. Ct. 1043; *Reynolds v. Stockton*, 140 U. S. 254, 265, 266, 11 St. Ct. 773; *Clarke v. Arizona Mutual Sav. & Loan Assn.*, D. C. 217, F. 640, 642 644; *Gentry v. U. S.*, 8 Cir. 101, S. 51.

2. *A denial of due process and equal protection of the laws in the State courts is State action within the meaning of the XIV Amendment and presents a case where the jurisdiction of this Court properly may be invoked.*

Whether the taking of property or personal rights is under a judgment, order, or administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the ruling was so arbitrary, unjust, or unreasonable as to be a deprivation of property in violation of the Fourteenth Amendment. *Washington ex rel. Oregon R. Nav. Co.* v. *Fairchild*, 224 U. S. 510, 32 St. Ct. 535; *Chicago M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 10 St. Ct. 462; *Smyth* v. *Ames*, 149 U. S. 466, 18 S. Ct. 418; *Chicago M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 173, 20 S. Ct. 336.

Action by any division, department, or branch of the State, including the judicial branch, is State action within the meaning of the Fourteenth Amendment. *Ex parte Va.*, 100 U. S. 339; *Virginia* v. *Rives*, 100 U. S. 313; *Mooney* v. *Holan*, 294 U. S. 103; 55 St. Ct. 340; *Twining* v. *N. J.*, 211 U. S. 78, 29 S. Ct. 14.

A judicially established rule is subject to the same constitutional limitations as those established by the State Legislature. *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, 984, 985. At page 984:

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form."

In the case of *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, Mr. Chief Justice Vinson said:

> "That the action of State courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which had long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. That, in Virginia *vs.* Rives, 100 U. S. 313, (1880) this Court stated: 'It is doubtless true that a state may act through different agencies, either by its Legislative, its Executive, or its Judicial authorities; and the prohibitions of the Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In ex parte Virginia, 100 U. S. 339, 347 (1880), the Court observed: 'A State acts by its Legislative, its Executive, or its Judicial authorities. It can act in no other way.' In the Civil Rights Cases, 109 U. S. 3, 11, 17 (1883) this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guarantees therein contained, and extends to manifestations of 'State authority in the shape of law, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.
>
> Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided."

The provisions of the Fourteenth Amendment are universal in their application to all persons within the territorial jurisdiction of the U. S. without regard for any differences of race, of color, or of nationality. To invoke the Fourteenth Amendment, it is not necessary that petitioners show that they are members of a minority group,

or that their nationality, race, or creed subject them to discrimination. Discrimination may and does result from other causes. Equal protection of laws is a pledge of equal laws, equally administered as to all persons. *Truax* v. *Raich*, 239 U. S. 33, 36 S. Ct. 7.

3. *Conclusion.* When the State Court fails to give effect to a contract which is clear and unequivocal on its face; where judgment is had on a theory of damages which is neither alleged nor proved; where the judgment is based upon return of merchandise where there is no allegation or proof of rescission of the contract; and where the entire conduct of the parties is such as to bar rescission; in such case the State courts have denied the parties due process of law and the equal protection of the law, and for that reason the jurisdiction of this Court should be invoked. The question is not limited to a correction of error in the State Court but concerns the fundamental rights guaranteed by the United States Constitution and where such rights are violated by the State courts, only this Court can provide the means of safeguarding such rights upon which our entire judicial system is based. When the Supreme Court of Ohio refused to grant the Motion to Certify the Record it denied Petitioner the right to be heard on the errors complained of and denied to him procedural due process.

In *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 64 S. Ct. 599, the Court said:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effects upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. Davidson *vs.* New Orleans, 96 U. S. 97, 107, 108, Ballard *vs.* Hunter, 204 U. S. 255, 27 S. Ct. 261; North Laramie Land Co. *vs.* Hoffman,

268 U. S. 282, 45 S. Ct. 491; Dohny *vs.* Rogers, 281 U. S. 369, 50 S. Ct. 299, and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Argument

Petitioner was denied due process and the equal protection of the laws because the State courts in violation of settled principles of law and contrary to undisputed facts erred in the following respects:

1. *In failing to give effect to a contract* (R. 164) *which was clear and unequivocal on its face.*

The uncontradicted and undisputed evidence was that Petitioner's agent Coquillard on the occasion of his second trip to San Francisco signed a letter acting on behalf of Petitioner, which letter was drafted and prepared by Coquillard and Respondent at Respondent's office and at Respondent's request. (R. 73-74) By the terms of this agreement Petitioner agreed to pay upon demand to Respondent the difference between 9½ cents per pound and $13,624.41 as indicated on Respondent's invoice. This latter amount referred to is contained in the computation of damages that is an Exhibit and attached to Respondent's petition (Appendix A), (R. 3-4) and the amount of $13,624.41 is arrived at by listing at 10½ cents per pound the 107,211 pounds of steel that was in dispute, plus warehousing, overhead, and all other expenses incurred. Therefore, the agreement of Petitioner to pay the difference between that amount and 9½ cents per pound is the equivalent of a $20.00 per ton allowance on the disputed portion, plus payment of expenses incurred. The mathematical computation of the sum of that difference is $3,439.36. That is the maximum recovery that should be possible under the facts in this case.

If a rescission had been effected, this agreement represented a subsequent sale of the goods in question to Respondent. In any event, it is an agreement arrived at between the parties for a valuable consideration and disposing of their differences. Since the action was brought subsequent to this agreement, the Respondent cannot claim recovery for the full value of the goods when such goods are the property of Respondent at the time that they brought suit.

Such a modification should be given effect. *Cragin* v. *Eaton*, 153 Miss. 151, 97 So. 532; *Johnson* v. *Broughton*, 183 Ky. 628, 210 S. W. 455; *Treras & Schack* v. *Napel Mills Co.*, 241 Mass. 452, 135 N. E. 477; *Ellis Gray Milling Co.* v. *Sheppard et al.*, 215 S. W. 2d 57.

The Court should have found as a matter of law that the maximum recovery possible if Respondent prevailed is the amount stated in the agreement which when computed is $3,439.36.

2. *In permitting a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.*

Where Buyer alleges that the goods did not conform to the contract, but does not allege, nor prove in evidence the value of the goods at the time of delivery, does Buyer state facts sufficient to constitute a cause of action for damages for breach of warranty?

As a matter of law, the verdict of the jury cannot be sustained on the theory of breach of warranty because Respondent did not allege the value of the goods delivered to him and introduced no evidence on this. Instead, Respondent's petition computed the alleged damages in an Exhibit as a part of the petition (R. 3-4). Examination of this computation reveals that Respondent asked for the return of the money paid for the portion of the goods de-

livered that Respondent contends did not conform to the contract.

Nevertheless, the trial court charged the jury that if its verdict is for the Respondent ". . . it should be in such an amount, the difference between the value of the steel at the time of the delivery to the Buyer, and the value, if it had answered the warranty, plus any special damage . . ." (R. 154).

The facts in the case and charge of the Court are remarkably similar to *Crooks & Co.* v. *The Eldridge & Higgins Co.* (1901) 64 Ohio St. 195, 60 N. E. 203. There, plaintiff contended that bags of sugar delivered "were unfit for use" and "that there was no consideration" for the payment of the money sought to be recovered. The Supreme Court held that to sustain a recovery for plaintiff under this petition it must be shown that the sugar was entirely worthless. If the sugar was proven to have any value whatever, the plaintiff could not recover the price paid for it without rescinding and avering and proving that it made, or offered to make, restitution of the entire lot of sugar purchased, within a reasonable time. The trial court charged that "the amount of its recovery should be such amount as the evidence shows plaintiff paid the defendant for said 187 bags of sugar, and the expense incurred in connection therewith, not to exceed the sum of $1,012.56, less the value, if the evidence shows there is any value, of the 187 bags of sugar, now in plaintiff's possession."

The Supreme Court held that "This charge was not applicable to the case made in the pleadings. It is evident that the jury made up their verdict upon the measure of damages thus given to them by the court; for if they had found that the sugar was of no value at all their verdict must have been for the plaintiff for the full amount paid

for the sugar, which it was not. But having found that the sugar had some value the jury must necessarily have found for the defendant under the issues as made up and not amended. The Court, however, required the jury to return a verdict for damages which were not claimed in the petition. In fact the Common Pleas Court seems to have tried this case on the theory that it was a case for damages, although the jury were emphatically instructed that the plaintiff could recover only upon the special matters alleged in the petition. In this we think there was substantial and prejudicial error."

The verdict of the Common Pleas and the Circuit Court affirming it were thereupon reversed.

This precise situation was repeated in the case at bar and here too the jury did not give Respondent a verdict for the full amount paid for the steel, but instead must have computed its verdict on damages which were not claimed in the petition. Under the rule of the *Crooks* v. *Eldridge* case cited, we believe that there was substantial and prejudicial error.

In order to sustain damages for breach of warranty the value of the goods delivered must be pleaded and proved. Ohio General Code Section 8449 (7), *Klein Structural Steel Co.* v. *John J. Pool Co.*, 26 Ohio App. 420, 160 N. E. 520, (1927), *Willeke* v. *Neuenschwander*, 24 Ohio Law Abs. 540 (Ohio Appeals) (1937).

Respondent made no attempt to either plead or prove the value of the goods delivered and therefore cannot recover damages for breach of warranty.

3. *In permitting judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.*

Where goods are delivered to Buyer under contract, and Buyer alleges that they notified Seller that they would hold

the alleged non-conforming shipment subject to the order of Seller, is this sufficient to sustain an action in rescission?

The only allegation in Respondent's petition on the question of rescission was: ". . . Upon discovery of the overshipment of the lighter gauge steel, the plaintiff notified the defendants that they, the plaintiffs, would hold the excess shipment of light weight steel subject to the order of the defendants and accordingly the plaintiff placed said steel in a warehouse in San Francisco . . ." (R. 1) and further that ". . . defendant failed to direct the disposition of said steel so held in storage . . ." (R. 2).

Respondent's allegation that they ". . . would hold the excess shipment . . . subject to the order of defendants . . ." is insufficient to allege a cause of action based on rescission.

The pertinent portions of Section 8449 of the General Code of Ohio bearing on the question of rescission are as follows:

> "Section 8449, Breach of Warranty. (1) When there is a breach of warranty by the seller, the buyer may, at his election—
>
> (b) Accept or keep the goods and maintain action against the seller for the damages for the breach of warranty;
>
> (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;
>
> (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods already have been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.
>
> (3) When the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to

return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the Buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) When the Buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) When the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods, as bailee for the seller, but the subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcements of such lien allowed to an unpaid seller by section eighty-four hundred and thirty-three."

Section 1 (d) cited above expresses the general rule. This was at issue in *McClarran* v. *Longdin-Brugger Co.*, 24 Ohio App. 434. That case involved facts similar to the case at bar wherein buyer claimed that goods received from seller did not comply with the contract of sale. The Court stated:

> "The general rule is that one of the essentials to a rescission of the sale for a breach of warranty is that the goods must all be returned, and that the buyer will not be permitted to return a part and return the balance."

And further that:

> "There are some authorities to the effect that under certain circumstances a small portion of the goods need

not be returned, or where the contract is severable and not entire, or where the article sold is one which must be used before its quality can be ascertained, the quality not being apparent from examination, it is the right of the buyer to use such portion of the property as is necessary to determine the quality, and that such use does not affect the right to rescind and return the goods, with proper notice, to the seller. However, the weight of authority seems to be that, even where a small portion of the goods might be retained, such rule could have no application where so large a portion of the goods has been retained as appears from the pleadings and the record in this case."

The Court goes on to say:

"Ohio is one of the states that has adopted the Uniform Sales Act. Section 8449, General Code, provides how the buyer may rescind the sale for a breach of warranty as to quality. One of the provisions is that the goods must be returned and notice be given within a reasonable time. There is nothing in this section to the effect that any part may be retained, and the defendant having retained and paid for so large a portion of the goods, to-wit, four-tenths, or nearly one-half, we think that his right and remedy, if he has any, as appears from the answer and the record in this case, would be one for damages under Section 8429, which also provides that after acceptance of the goods, if the buyer claims damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale, the buyer must 'give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach.' *Bloch v. Eastern Machine Screw Corp.* (C. C. A.), 281 F., 777."

In the case at bar, the petition discloses that of 251,080 pounds of steel shipped, 107,211 pounds is complained of as not conforming to the contract. (See Exhibit attached to plaintiff's petition (R. 3-4).) Since this is disclosed on

the face of the petition, it would negate the idea of rescission.

The Court continued further saying that giving notice is an essential element in an action founded in damages under Section 8429, or an action based on a rescission of the sale under Section 8449, and that defendant (buyer) in that case did not notify seller of his claimed breach of warranty until the filing of the Answer, and there was evidence of having expressed his satisfaction with the goods after received.

The Court held that:

> "Hence, under the answer filed in this case, showing such a large portion of the goods returned, without any allegation of notice of rescission or notice of any claim of breach of any promise or warranty, and the record clearly showing by the defendant's own testimony, that he accepted and retained the goods from the latter part of October until the middle of March, and that he never gave any notice to plaintiff of any claimed breach of any promise or warranty as to quality or otherwise, or of his intention to rescind the sale, or gave any explanation as to why he paid for four tops and shipped back the other six tops, until he filed his answer, we are unanimously of the opinion that the defendant under this record has neither pleaded nor proven a legal defense."

The facts in the case at bar are similar. Even the amount of the goods that were retained by the buyer—four-tenths—is almost the identical amount retained in each case (and this is revealed in the Exhibit attached to plaintiff's petition). The uncontradicted testimony was that Respondent was aware of the alleged defect while the steel was still on the freight cars (R. 65). They did not have to use a portion of it to determine its quality. Under these circumstances the goods should have been returned and notice given within a reasonable time. Respondent failed to do this.

According to Section 8449 (3), Ohio General Code, cited above, the buyer cannot rescind if he knew of the breach of warranty when he accepted the goods. Respondent knew of the condition of the steel but chose to accept it, by using a portion and exercising dominion over the balance which was the subject of his complaint.

The question naturally arises as to whether Section 8430, Ohio General Code, would make valid the allegation of Respondent's petition that they hold at the order of Petitioner. That section reads:

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he notified the seller that he refuses to accept them."

It is respectfully submitted that this section does not apply to the case at bar. Section 8430 is pertinent only when buyer refuses to accept the goods and does not concern rescission. The requirements for rescission are specifically set forth in Section 8449, which must be followed. In *McClarran* v. *Longdin-Brugger Co.* the Court did not even consider Section 8430 under facts similar to those of the case at bar, and held that the requirements of Section 8449 must be followed. This is supported by the fact that in *Rheinstrom* v. *Steiner*, 69 Ohio State, 452, the leading case under Section 8430, the entire shipment of labels was rejected and buyer made a positive statement rejecting them. The Court did not have to consider the problem of rescission. There the labels were kept in the original packages as delivered and the Court stated that no prejudice was caused to the sellers by failure to return them because the labels were of no use to sellers. In the fact situation of the case at bar plaintiff must comply with Section 8449 on rescission.

Further, in *Kulber* v. *Fairmount Creamery Co.*, 40 Ohio Op. 170 (Cuyahoga County, 1948) the Court stated:

> "In seeking redress under the remedy of rescission the buyer must act promptly in rejecting the goods after discovery that the goods are not as represented and must also put the seller in status quo."

Respondent's pleading and the evidence does not satisfy this requirement of delivering back or offering to return what it received under the contract.

In the *Kulber* v. *Fairmount Creamery* case cited above the Court pointed out that after buyer's offer to rescind was refused by seller, buyer continued to sell the goods, and that they had knowledge of the breach of warranty, but nevertheless dealt with the goods in such a way as to make it impossible to put the defendants in status quo, and after thus dealing with the goods they could not claim the right of rescission.

In *Willeke* v. *Naunschwander*, 55 Ohio App. 527, 9 Ohio Op. 183, the Court on a similar question stated:

> "The petition, therefore does not state a cause of action for damages for the breach of warranty through failure to allege facts showing the damages were sustained, and does not state a cause of action for recovery of purchase price which had been paid, by reason of failure to allege rescission of the contract and the return of the horses or offer to return same to seller."

Even the return of an allegedly defective automobile to a dealer's lot without informing him of an election to rescind has been held that it did not constitute notice to the dealer of the purchaser's intention to rescind or a compliance with Section 8449 (3), Ohio General Code. *Swisher* v. *Miami Motors*, 81 Ohio App. 97.

An unequivocal offer to return the merchandise to seller was also required in *Hirschel dba Diamond Furnace Co.* v.

Richards, 28 Ohio App. 38, and *Champion Animal Food Co.* v. *L. B. Reich Distributing Co.*, 50 Ohio Law Abs. 199.

And finally, it is stated in *Williston:*

> "But if property and possession have passed and the buyer wishes to remit the property in the seller, a return or offer to return is necessary. It is not sufficient for a buyer who has taken delivery of the goods at said door or place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or request him to come and take them back. But if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless, upon making offer to do so, he is relieved of the obligation, as stated by a refusal to receive them if tendered." 3 *Williston, Sales*, Section 610 (page 353) (Revised ed. 1948). See also *Millikin* v. *Skilling*, 89 Me. 180, 36 A. 77, quoted and followed in *Mundt* v. *Simpkins*, 31 Neb. 1, 115 N. W. 325.

4. *In permitting judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.*

1. *Where Buyer notifies the Seller that goods delivered do not conform to contract, does Buyer's previous course of dealings and subsequent acts and conduct bar Buyer from claiming rescission of the contract; such acts being acceptance and use of a portion of the goods, placing the remainder in a warehouse with other goods belonging to Buyer, advertising for sale the disputed portion of the goods together with the other goods not received under the contract, selling a portion of the disputed goods, and making a subsequent agreement with Seller concerning the disputed goods?*

Section 8428 of the General Code of Ohio concerning "Acceptance, when complete" provides:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or

when the goods have been delivered to him, *and he does any act in relation to them which is inconsistent with the ownership of the seller*, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

See *McClarran* v. *Longdin-Brugger Co.*, 24 O. App. 434.

The record in the case at bar is replete with instances where buyer, hereinafter designated as plaintiff, did acts inconsistent with alleged ownership of seller, hereinafter designated as defendant. Furthermore, there are numerous indications of acts indicating that plaintiff retained the goods after making his first questionable rejection.

Of 251,080 pounds which was the total amount of steel shipped, plaintiff claimed that 107,211 pounds was an overshipment of lighter gauge steel than that which was ordered. Although Respondent claims to have discovered this fact while the steel was on the freight cars (R. 65), Respondent did not reject the entire shipment, but chose to unload the steel, use a portion of it and store the remainder in a warehouse in which it stored such steel (R. 89-95).

Although Section 8424 (3) of the General Code of Ohio provides that:

> "When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

There are special circumstances in the case at bar which would indicate that acceptance of a portion of the goods would constitute an acceptance of the entire amount. Authority for this view is taken from Section 8424 (4) of the

General Code of Ohio, immediately following the above-quoted section:

> "The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

Petitioner submits to the Court the proposition that as a matter of law arising out of the usage of the trade, special agreement between these parties, and the course of dealings between the parties that the Respondent should be held to have accepted the shipment and should not be allowed to claim a rescission in view of the testimony at the trial. The jury should have been instructed by the trial court that Respondent's conduct and dealings previous to the shipment at issue, and its conduct and acts subsequent to the delivery are as a matter of law inimical to the theory of rescission.

Respondent originally contracted for a quantity of steel, in fact, forty per cent of the shipment, that they could not use in their business of manufacturing stoves because the gauge was too light. For reasons of their own which do not appear in the evidence, but probably due to the great demand for steel at the time, they had been making other purchases in this manner. The Exhibit which is attached to their petition (R. 3-4) shows that they had already stored at the Ballinger Warehouse, at the time of receipt of this disputed shipment, non-usable steel from Mojul (another source of supply) non-usable steel received from this defendant in a previous shipment not in dispute here, and non-usable steel which is merely identified by Respondent as "our property—too sprinkled for use."

In view of the fact that Respondent had contracted for a shipment to consist in part of non-usable steel (R. 66, 77), and had been doing that previously, not only with this Petitioner, but with other suppliers of steel (R. 81-84), the

act of Respondent in accepting a part of the shipment of the steel should operate as an acceptance of the whole shipment. If this view is adopted Respondent foreclosed itself of any claims by its acceptance of the shipment.

However, in addition to the previous course of dealings of Respondent showing that there was an acceptance of the steel, Respondent's subsequent acts and conduct are inconsistent with any rejection of the alleged non-conforming shipment.

From the very outset Respondent did not follow the course of a clear cut rejection of the entire shipment. Instead, Respondent's petition makes the half-hearted statement that, ". . . Upon discovery of the overshipment of the lighter gauge steel, the plaintiff notified the defendants that they, the plaintiffs, would hold the excess shipment of light weight steel subject to the order of the defendants and accordingly the plaintiff placed said steel in a warehouse in San Francisco . . ."

Respondent also alleged that Petitioner ". . . failed to direct the disposition of said steel so held in storage . . ."

However, Respondent failed to act in a manner consistent with these statements. There was no testimony of Respondent having notified Petitioner that they were holding the alleged non-conforming shipment subject to the order of Petitioner. Instead, the only testimony was that Respondent telephoned Petitioner to complain about the shipment (R. 54). Respondent did not take a definite position on the ownership of the steel. Their position was that they wanted their money back for the portion of the shipment that they claimed did not conform. This did not amount to a rescission or tender back of the steel.

The Petitioner came out to San Francisco in February, 1948 (R. 54), and afterward, until July of 1948 ensued efforts to sell the steel. Respondent contended that Petitioner was selling it for himself and Petitioner contended

that any efforts made by him were only to assist Respondent and that it was Respondent's steel that was being offered for sale. From the first, Petitioner stated that he hoped to sell to Respondent in the future and any efforts made by Petitioner were only to attempt to satisfy Respondent, if possible (R. 113).

Where there is a conflict, as there is here, of the testimony of the parties, the Court should look to the actions of the parties to determine the issue. We contend that as a matter of law, Respondent's actions were inconsistent with rescission. The previous course of dealings has already been discussed. With regard to subsequent acts and conduct certain questions are pertinent. If Respondent took the position that Petitioner had accepted the return of the steel and was to dispose of it as a result of Petitioner's first trip to San Francisco, why did Respondent thereafter concern itself over the sale of the steel? Why did they attempt to sell it themselves, and advertise it for sale together with other steel that they owned? Why did they store the steel in a warehouse which they used for the purpose of storing steel that they purchased, which steel they were unable to use? And why did they prepare a letter which was signed by Coquillard, acting for plaintiff, which contained terms for the disposition of the steel? (R. 164).

In view of these circumstances the conduct of Respondent before and after the sale at issue would negative the idea of rescission, and in any event result in a waiver thereof.

See 35 *Ohio Jurisprudence*, Section 245, page 982, where the following is stated:

> "Continued use of the chattel, after notice of rescission under the circumstances set out, may, however, constitute a waiver of his Option to rescind, though not of his option to claim damages due to the breach. If the buyer has resold the goods or if the

goods have been destroyed or injured, even without the buyer's fault, it has usually been held that the possibility of rescission is gone."

In the case of *Kulber v. Fairmount Creamery Company*, 40 Ohio Op. 170, 80 N. E. 2d 246 (C Cuyahoga 1948), the plaintiff's evidence showed that after the offer to rescind the sale, which was refused by the purchaser, the plaintiff continued to make sales to other customers. The Court stated:

"By their own acts, therefore, after they had knowledge of their claim of breach of warranty they dealt with the goods in such a way as to make it impossible to put the defendants 'status quo'. They could not, therefore, after thus dealing with the shrimp, claim the right of rescission."

In 46 *American Jurisprudence* 896, Section 765, it is stated:

"Moreover, after an attempted rescission by the buyer of chattels, which the seller has not accepted, the buyer, if he intends to rely upon it, must adhere thereto and act consistently therewith, and if he thereafter continues to use the property as his own, he may be held to have waived or abandoned the rescission, and may be precluded from rescinding or asserting a claim that he has rescinded; in other words, the use of chattels sold, by the purchaser, after the seller has refused the latter's tender of them in a rescission of the contract defeats the attempted rescission, if the property was used for the personal benefit of the purchaser, and not merely in compliance with his duty as bailee of the seller."

As a matter of law the evidence in the case before the Court showed special circumstances arising out of usage of trade, course of dealing between the parties, special agreement, and subsequent acts and conduct of Respondent,

all of which should preclude Respondent from asserting the remedy of rescission, and compelling judgment for the Petitioner. No instruction as to this was made by the trial court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD D. WYNER,
Counsel for Petitioner.

Dated July 3, 1952.

MILTON H. WYNER,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,
Petitioner,

vs.

HEATING EQUIPMENT MANUFACTURING CO.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of the State of Ohio.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The verdict of the jury in favor of the Respondent below, on which the judgment in the Court of Common Pleas was based is set forth at length in the record (R. 16-17). The findings of the Court of Common Pleas on the Petitioner's motion for new trial was also set forth in the record at length (R. 20-21). The judgment of the Court of Common

Pleas was affirmed without written opinion by the Court of Appeals, Eighth District, on November 7, 1951 (R. 174). The order of the Supreme Court of the State of Ohio, denying the Petitioner's Motion to Certify the record is set forth in the record at length (R. 176).

JURISDICTION.

1. Petitioner bases his Petition for a Writ of Certiorari on the judgment of the Court of Appeals for the Eighth District of Ohio, which was entered on November 7, 1951 (R. 174), citing the denial by the Supreme Court of the State of Ohio on February 6, 1952, of Petitioner's Motion to Certify the Record (R. 176) for his position that the judgment of the Court of Appeals was rendered in the highest court of the State in which a decision could be had.

2. The jurisdiction of this Court is invoked by the petitioner under 28 U.S.C. Sec. 1257 (3).

3. The section of the Constitution of the United States on which petitioner relies is Amendment XIV, and that clause thereof which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The questions presented by petitioner's application for a writ of certiorari are as follows:

1. Is any Federal Question presented by the petitioner for a writ of certiorari to a state court in a cause involving only the construction and application of the Ohio Sales Act by the Ohio Courts?

2. Has Petitioner complied with the rules of this Court and in particular Rule 38 and Rule 12 thereof, relating to the form of jurisdictional statements required in appeals and Petitions for Writs of Certiorari to a state court, and in particular the following requirements thereof:

   (1) The statement specifying the stage in the proceedings in the court of first instance, and in the appellate court at which and the manner in which the Federal Questions sought to be reviewed were raised?

   (2) The method of raising such Federal Questions and the manner in which they were passed upon by the Court with pertinent quotations of specific portions of the record, or summary thereof, and specific references to the places in the record where the matters appear which will support the assertion that the rulings of the Court were of a nature to confer jurisdiction upon this Court?

3. Is Petitioner deprived of due process of law or equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution

of the United States by the action of a state appellate court in affirming a decision of a state trial court on a question of state law based upon findings of fact by a properly constituted state jury on the basis of evidence which the state courts held to be conflicting but substantially in Respondent's favor?

4. Does the due process clause of the Federal Constitution entitle a party to a civil action to review in the Supreme Court of the United States from an adverse ruling of a state court on a question of state law?

STATUTES INVOLVED.

In addition to the Due Process and Equal Protection clauses of the Constitution of the United States upon which Petitioner relies, the following sections of the General Code of the State of Ohio are also involved:

Ohio General Code, Section 8424 (3):

> "When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

Section 8428:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation

to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Section 8430:

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he notified the seller that he refuses to accept them."

Section 8449:

"Section 8449, Breach of Warranty. (1) When there is a breach of warranty by the seller, the buyer may, at his election—

(b) Accept or keep the goods and maintain action against the seller for the damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods already have been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. . . .

(3) When the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if

he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the Buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) When the Buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) When the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods, as bailee for the seller, but the subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcements of such lien allowed to an unpaid seller by section eighty-four hundred and thirty-three."

The petitioner has also cited Ohio General Code Sections 8429 and 8449(7) upon collateral points.

STATEMENT OF FACTS.

As the facts in this matter were found generally in the Respondent's favor by the jury in the trial of this action in the Court of Common Pleas (R. 16-17) and such findings were adopted by the Trial Judge on the Petitioner's motion for a new trial (R. 20-21), the facts as so found by the jury and the Trial Judge must be accepted as conclusive in this matter.

The facts as so found (R. 20-21) are simple and do not require extensive restatement here. Respondent is a California corporation which ordered steel from the Petitioner from his principal office in Cleveland, Ohio. According to the Respondent's testimony, which the jury evidently accepted, the order was for steel of a certain gauge, and the Petitioner did not ship to the Respondent all of the goods of such specifications that the Respondent ordered, but shipped steel of other gauges not conforming to Respondent's purchase order. Respondent commenced this action in the Ohio courts for damages for breach of warranty.

The Court and jury found that the Respondent accepted the goods which complied with the specifications of his purchase order and notified the Petitioner that he would warehouse the non-complying goods, subject to Petitioner's order, and demanded reimbursement for the non-conforming goods.

The Petitioner thereupon personally travelled to San Francisco and later sent an agent to San Francisco. The Court and jury found that Petitioner took possession of these goods and fixed a price at which they were to be sold. The Court and jury further

found, at the time when Petitioner took possession of these goods, they were as a matter of law returned by the Respondent to the Petitioner. (R. 20-21.)

Some claim is made by Petitioner that a letter signed by his agent and delivered to Respondent constituted a modification of the prior sales contract, but the Court and jury obviously did not accept this claim (R. 154, 156).

ARGUMENT.

1. THE QUESTIONS PRESENTED BY THIS PETITION FOR WRIT OF CERTIORARI ARE ENTIRELY MATTERS OF STATE LAW, AND POSE NO FEDERAL QUESTIONS JUDICIALLY COGNIZABLE BY THIS COURT UNDER THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION.

It is Hornbook teaching that the Supreme Court of the United States exercises appellate jurisdiction over decisions of state courts only when real and substantial Federal Questions are drawn in controversy in the state courts, and are actually and necessarily decided by the state court adversely to the appellant's or petitioner's claim of Federal rights. Such Federal Questions may involve either the Federal Constitution or a Federal statute or treaty, but it is equally elementary that the construction of a state constitution or a state statute, an interpretation of the state's common law, are matters beyond the appellate jurisdiction of the Supreme Court of the United States.

In the leading case of *Murdock v. Mayor of Memphis,* 20 Wall. 590, 22 L. Ed. 429 (U. S. 1875), this Court passed upon a claim similar to the petitioner's

apparent attempt to invoke the jurisdiction of the Supreme Court of the United States to review matters of State law. This Court disposed of the claim in an historic decision which remains to this day as the classic and definitive statement of this Court's jurisdiction over decisions of state courts, whether such decisions arise by appeal or by writ of certiorari. The Court said there, through Mr. Justice Miller:

> "The proposition is that by a fair construction of the Act of 1867 this Court must, when it obtains jurisdiction of a case decided in a State Court, by reason of one of the questions which the case presents which may be found necessary to a final judgment on the whole merits. To this has been added a further suggestion that in determining whether the question on which the jurisdiction of this Court depends, has been raised in any given case, we are not limited to the record which comes to us from the State Court—the record proper of the case as understood at common law—but we may resort to any such means of ascertaining what was really done in the State Court as this Court may think proper, even to *ex parte* affidavits. . . ."

> "Is it consistent with this extreme caution to suppose that Congress intended, when these cases came here, that this Court should not only examine those questions, but all others found in the record—questions of common law, of state statutes, of controverted facts, and conflicting evidence? Or is it the more reasonable inference that Congress intended that the case should be brought here that those questions might be decided and finally decided by the Court established by the Constitution of the Union, and the Court

which has always been supposed to be not only the most appropriate but the only proper tribunal for their final decision? . . . The State Courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly. . . ."

"We are of the opinion that upon a fair construction of the whole language of the section the jurisdiction conferred is limited to the decisions of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected."

Even in the period before the decision by this Court in *Erie Railroad Co. v. Tomkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) when, under the doctrine of *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865, it was supposed that there existed a Federal common law applying to commercial transactions in diversity of citizenship cases, it was never supposed that the so-called Federal common law applied where state *statutory* law existed. And of course, since the decision in *Erie v. Tomkins,* it has been clear that there is no Federal common law in commercial transactions, regardless of the presence or absence of state statutory law.

The Court there held:

"Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the

> law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Indeed, the proposition is so well established in federal law that the Supreme Court has no jurisdiction to correct even erroneous decisions of a state court on the interpretation of state law, that the petitioner's attempt at this time to invoke the jurisdiction of this court can only be characterized as "sham and frivolous". For it is equally well decided that the federal question involved must be a real and substantial federal question, and not merely a sham or unsubstantial federal claim.

Wabash Railway Co. v. Flannigan, 192 U.S. 29, 38, 24 S. Ct. 224, 48 L. Ed. 328 ("manifestly lacking all color of merit"); *Seaboard Air Line Ry. v. Padgett,* 236 U. S. 668, 671, 36 S. Ct. 481, 59 L. Ed. 777 ("so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous"); *Erie Railroad Co. v. Solomon,* 237 U. S. 427, 430-31, 35 S. Ct. 648, 59 L. Ed. 1033; *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599-600, 33 S. Ct. 605, 57 L. Ed. 982 ("utterly without merit"); *Stewart v.*

Kansas City, 239 U. S. 14, 16, 36 S. Ct. 15, 60 L. Ed. 120 ("more formal than substantial").

It will be Respondent's position in this brief that the Petitioner's application for a Writ of Certiorari is sham and frivolous, and is interposed in this matter solely for purposes of delay. Upon this basis, Respondent is concurrently submitting to this Court a motion for the assessment of penalties against the Petitioner for filing a frivolous Petition for Writ of Certiorari.

We shall now proceed to demonstrate why in our opinion petitioner's attempt to show a properly presently Federal Question is devoid of all merit.

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2. NO CLAIM OF ANY FEDERAL CONSTITUTIONAL RIGHT WAS EVER MADE OR SPECIFICALLY SET UP BY PETITIONER AT ANY TIME IN THE TRIAL OR APPEAL OF THIS CAUSE IN THE OHIO COURTS.

Petitioner asserts the claimed constitutional question for the first time in this Court.

The decisions of this Court are absolutely clear that a party seeking to avail himself of a personal right or privilege under the Constitution of the United States must raise his constitutional claim at the first appropriate time under the procedure of the state from which the case arises.

In *Hartfield Life Ins. Co. v. Johnson,* 249 U.S. 490, 433, 39 S. Ct. 336, 63 L. Ed. 722, this Court indicated that the Federal Question must be asserted in the state courts:

> ". . . at the proper time and in the proper manner by pleading, motion or other appropriate action, under the state system of pleading and practice. . . ."

Rule 12 of the Rules of this Court establishes the same requirement and additionally requires that a Petitioner for a Writ of Certiorari affirmatively show in his petition when, where, and in what manner the asserted Federal Question was raised in the state courts. Paragraph 1 of Rule 12 of this Court provides as follows:

> "If an appeal is from a state court, the statements shall in addition specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. *The provision of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari.*" (See Rule 38, par. 2.)

The record in this case is absolutely devoid of any reference to the raising of a Federal Question in the Ohio State courts. Indeed, the entire trial and appeal of this cause has turned upon the construction and interpretation of the Ohio Sales Act, purely a matter of state law in an area where the decisions of the State courts are conclusive upon this Court. The petitioner has been unable to point to a single reference in the transcript of record in this matter where a Federal Constitutional question was raised either in the trial of this action or on its appeal in the Ohio State Courts.

The decisions of this Court are clear that the Federal Question may not be raised for the first time in the petition for a writ of certiorari. See *Hiawassee River Power Co. v. Carolina- Tennessee Power Co.*, 252 U. S. 341, 344, 40 S. Ct. 330, 64 L. Ed. 601; *White River Lumber Co. v. Harrison ex. Rel. Applegate*, 279 U. S. 692, 700, 49 S. Ct. 457, 73 L. Ed. 903.

It is equally well decided that federal questions raised in briefs in the state court form no part of the state court record, for the purposes of Supreme Court review, and cannot be relied upon to establish that a federal question was raised. See *Live Oak Water Users' Assn. v. Railroad Commission of California*, 269 U. S. 354, 357-58, 46 S. Ct. 149, 70 L. Ed. 305. *A fortiori*, raising a federal question in oral argument before the state court is unavailing as such oral argument is not a part of the state court record.

3. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THE OHIO STATE COURTS.

It is now well established that the due process of law required by the Fourteenth Amendment to the Constitution of the United States has both procedural and substantive connotations. It is not clear from the Petition for Certiorari in this action whether Petitioner relies on a procedural deficiency in the trial of this action or whether he relies solely on the matter of the substantive law applied by the Ohio courts, or whether he simply seeks a third opportunity to appeal an adverse decision after having failed in two prior attempts to reverse the judgment of the trial court.

Whatever petitioner's position may be, it is clear that due process of law does not require even a single appeal, and therefore it clearly does not entitle petitioner to a third appeal to this Court.

The Court said, in *Reetz v. Michigan*, 188 U. S. 505, 507, 508, 23 S. Ct. 390, 47 L. Ed. 563 (1903):

> "It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision. . . . We know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court of a board of registration, the final determination of legal questions. . . . Neither is the right of appeal essential to due process of law."

The meaning of the due process of law which a state is compelled by the Federal Constitution to afford a litigant in a civil suit is indicated in *Brinker-*

hoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 551, 74 L. Ed. 1107 (1930):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

The *Brinkerhoff* case makes clear that the Supreme Court cannot decide what the state law is, but can only require that the state courts, in applying their self-determined substantive and adjective law, the "due process" which that law provides.

The "due process" to which petitioner is entitled, however, is only an opportunity to have his position heard in a properly constituted state tribunal having jurisdiction over the parties and the subject matter. It does not entitle him to a correct decision under state law, because the correction of errors of state law is left exclusively to the state courts. The requirements of "due process" were aptly stated by Mr. Justice Brandeis, in his concurring opinion in *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 76, 56 S. Ct. 720, 80 L. Ed. 1033 (1936), as follows:

"To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. . . . They tell us that due process is not necessarily judicial process. . . . And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

"The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government . . .) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. . . . A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."

Petitioner's arguments that when a case is decided by a state court in violation of settled principles of law, and contrary to undisputed facts, due process of law and equal protection of the laws are denied to

the parties. (*Petition for Certiorari,* p. 12.) At the risk of repetition, Respondent again points out that the settled principles of law we are discussing are principles of *state law* with which this Court has no concern. Indeed, the *Brinkerhoff* case recognizes that a state court may, if it chooses, overrule a prior decision, and the party adversely affected thereby, even though he may have relied on the prior decision, cannot complain of a deprivation of due process. The Ohio Courts in this respect are as free to change their law of sales contracts as the Ohio legislature, subject only to their own rules of *stare decisis.*

With respect to Petitioner's claim that the facts in this matter were undisputed, it is difficult to find the basis for such argument in the record in this case. Indeed, a fair reading of the record shows that the facts were warmly disputed by both Petitioner and Respondent.

It is too elementary to require further citation in answer to Petitioner's argument (Petition for Certiorari, p. 8) that the measure of recovery in this matter was erroneous. It is clear that the matter of pleading and proof of damages and the manner in which a rescission may be effected are solely questions of Ohio law, and in this respect the Ohio courts are no more bound by the authorities cited by Petitioner in his brief than they would be bound by the precedents of sister states.

All of the elements of due process have been afforded Petitioner in this case. He was afforded the

opportunity of a hearing in a trial before a properly constituted Ohio Court, and a proper impanelled Ohio jury. No question was raised then, or is raised now, concerning the jurisdiction of the Ohio Court over the subject matter or the parties to the action. Petitioner received notice of the hearing and an opportunity to be heard. Indeed, his arguments have been heard and passed upon by not only one but three Ohio Courts. This is more than due process requires. Certainly due process does not require this Court to become a super court of review over all decisions of state law which one of the litigants may be dissatisfied or believe erroneous.

CONCLUSION.

Respondent reiterates its position that this Petition for Writ of Certiorari is sham and frivolous, and that this presents a proper instance for the Court to assess penalties. Only in this manner can the Court escape the burden of innumerable petitions for certiorari posed by vengeful or litigious parties without hope of success and solely for purposes of delay. Only through the occasional assertion of this Court's discretionary power to assess penalties for the filing of such sham or frivolous applications can the number of petitions be controlled. For these reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied and Petitioner should be assessed for penalties for the filing of a

frivolous petition, as provided in Rule 30 of the Rules of this Court, and Sections 1912 and 2103, Title 28, U.S.C.

Dated, San Francisco, California,
August 29, 1952.

Respectfully submitted,
SAUL PERLIS,
Counsel for Respondent.

ROBERT E. ZANG,
SEVERSON & MCCALLUM,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,

Petitioner,

vs.

HEATING EQUIPMENT MANUFACTURING CO.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of the State of Ohio.

MOTION FOR DAMAGES FOR DELAY.

Respondent, Heating Equipment Manufacturing Co., shows that the federal questions presented as a basis for the Petition for Writ of Certiorari in this case are unsubstantial, and have been previously foreclosed by opinions of this Court.

Respondent therefor moves the court, upon denial of said Petition, to allow damages and penalty to Respondent in accordance with the provisions of sub-

division 2, Rule 30, of the Revised Rules of this Court, and Sections 1912 and 2103, Title 28, U. S. C.

Dated, San Francisco, California,
August 29, 1952.

SAUL PERLIS,
SEVERSON & MCCALLUM,
Counsel for Respondent.